05-19-00280-CR

In the Court of Appeals
for the Fifth District of Texas
at Dallas

EX PARTE CHRISTOPHER RION,

APPELLANT

THE STATE OF TEXAS,

APPELLEE

On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Hon. Carter Thompson, Judge
In Cause No. WX18-90101-L

STATE'S RESPONSE BRIEF

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

BRIAN P. HIGGINBOTHAM
Assistant Criminal District Attorney
State Bar No. 24078665
Frank Crowley Courts Building
133 N. Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399
(214) 653-3625 | (214) 653-3643 fax
brian.higginbotham@dallascounty.org

Attorneys for the State of Texas

The State requests oral argument only if appellant argues.

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Statement of the Case

This case is a direct appeal from the trial court's denial of a pretrial application for writ of habeas corpus (the Application). 1 C.R. at 706; 1 Suppl. at 21. A grand jury returned two indictments against appellant, both arising out of the same transaction: for aggravated assault with a deadly weapon causing bodily injury to Claudia Loehr in cause no. F15-72104-L (the aggravated-assault case) and for manslaughter for causing the death of Claudena Parnell in cause no. F15-71618-L (the homicide case). 1 C.R. at 70, 74. The cases were not joined for trial; the homicide case proceeded to a jury trial; and the jury found appellant not guilty. 1 C.R. at 85, 89. Appellant then filed the Application in the aggravated-assault case. 1 C.R. at 91–126. The trial court denied his Application and entered findings of fact and conclusions of law. 1 C.R. at 706; 1 Suppl. at 4–21.

Statement of Facts

The State will supplement appellant's Statement of Facts with a discussion of the factual issues that were litigated in the homicide trial.

The State's evidence at trial fell into several categories—one of which concerned appellant's unsafe driving when he collided with Loehr and Parnell's vehicle. The State offered testimony about crash data from appellant's vehicle showing that, just one tenth of a second prior to the crash, appellant was driving 71 miles per hour, with 100% accelerator pedal application, and without any braking. 1 C.R. at 289. Testimony showed that the speed limit was 40 miles per hour at that location. 1 C.R. at 262. The State also offered testimony from eyewitnesses to establish that appellant was speeding and driving unsafely. 1 C.R. at 218, 253. During her testimony, Loehr (the complainant in the aggravated-assault case) said, "my God, [appellant] was going so fast." 1 C.R. at 218. She added that "It was so fast, I couldn't believe it. There was no time. There was no time. I couldn't even process what was happening, much less move out of the way. . . ." 1 C.R. at 218. William Cantwell, an eyewitness at the scene, testified that he saw a "blur"—appellant's vehicle—one that was speeding. 1 C.R. at 253.

The defense contested the evidence of appellant's unsafe driving. Appellant testified that he "was a very cautious driver[,]" who "never sped" and "never got a parking ticket." 1 C.R. at 373. Roger Rion (appellant's father) testified that appellant

was a "timid driver[,]" who had "excellent driving habits." 1 C.R. at 440. In fact, appellant's father testified that he was "always worried about [appellant] getting run over because [appellant] was so careful." 1 C.R. at 440.

To support its theory about appellant's safe driving, the defense submitted a blackout theory. During his case-in-chief, appellant testified that he did not remember anything about what happened during the traffic accident. 1 C.R. at 359–61. The defense implied that his memory loss could have happened because he was experiencing a panic attack while on the road. 1 C.R. at 49, 373. The defense even called a psychiatrist to testify, who diagnosed appellant as suffering from panic attacks and further opined that panic attacks could result in memory loss. 1 C.R. at 417, 421. The defense summarized this testimony during closing arguments: The psychiatrist "said that there's typically a loss of memory with a panic attack" and that she diagnosed appellant with a "panic disorder . . . ." 1 C.R. at 512.

The defense carried these themes throughout the case. During closing arguments, defense counsel asked, "Was [appellant] actually aware of the risk? What evidence did you hear, any of you all, that he's ever had a break before; that he's aware of it; that he's had 20, 30 speeding tickets, red light tickets, he's not actually aware of anything and consciously disregards?" 1 C.R. at 504. Defense counsel continued: "You have to be aware of it. There has to be some type of forewarning. There has to be some type of element beforehand, and that didn't happen." 1 C.R. at

504. Defense counsel also argued that appellant did not consciously disregard any risk:

> What evidence do you have of [appellant's] bad driving? What evidence do you have of drag racing? What evidence do you have of malice in his heart? What evidence do you have that there was no medical condition? What evidence do you have that this is somebody that didn't care about human life?

1 C.R. at 516. Based on one or more of these issues, the jury returned a verdict of not guilty. 1 C.R. at 85, 89.

Summary of the Argument

Appellant claimed in the Application that the State was barred by the doctrine of collateral estoppel from litigating certain facts in the aggravated-assault trial—but he failed to carry his burden to prove any of his claims by a preponderance of the evidence. In addressing a collateral-estoppel claim in a criminal case, the court applies a two-prong test. First, the court determines exactly what facts were necessarily decided in the first proceeding; and second, the court examines whether any necessarily decided facts constitute essential elements of the offense in the second trial. With respect to all of his claims, the Application failed to establish one or both prongs of this test, so the trial court did not abuse its discretion in denying habeas relief.

ARGUMENT

RESPONSE TO ISSUE 1

Appellant did not carry his burden to demonstrate in the Application that any issue was subject to collateral estoppel, so the trial court did not abuse its discretion in denying habeas relief.

Appellant claimed in his Application that the State is barred by the doctrine of collateral estoppel from litigating a number of facts in the aggravated-assault case. But because the Application failed to carry appellant's burden of proof, the trial court did not abuse its discretion in denying habeas relief.

Standard of Review

An appellate court reviews a trial court's decision to grant or deny an application for writ of habeas corpus under an abuse-of-discretion standard. *Pierson v. State*, 426 S.W.3d 763, 770 (Tex. Crim. App. 2014). When raising a double-jeopardy claim in a pretrial habeas application, the applicant bears the burden of proving his or her claim by a preponderance of the evidence. *Ex parte Peterson*, 117 S.W.3d 804, 818 (Tex. Crim. App. 2003), *overruled in part on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007).

The appellate court affords almost total deference to a trial court's determination of the historical facts that the record supports. *Id.* at 819. The appellate court affords the same level of deference to mixed questions of law and fact if the resolution turns on an evaluation of credibility and demeanor. *Id.* If, however, the

trial court's determinations are questions of law, or else are mixed questions of law and fact that do not turn on an evaluation of witnesses' credibility and demeanor, then the appellate court reviews those determinations *de novo*. *State v. Ambrose*, 487 S.W.3d 587, 596 (Tex. Crim. App. 2016). A decision to apply collateral estoppel is a question of law, applied to the facts, for which *de novo* review is appropriate. *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007).

In conducting its review, the appellate court is limited to reviewing the trial court's determination of the issues that were properly raised in the habeas petition and addressed by the trial court. *Ex parte Perez*, 536 S.W.3d 877, 880 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The trial court's determination should be upheld as long as it is correct on any theory of law applicable to the case. *Ex parte Jones*, 473 S.W.3d 850, 853 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (citing *Ex parte Taylor*, 36 S.W.3d 883, 886 (Tex. Crim. App. 2001)).

Applicable Law

Double jeopardy and collateral estoppel: The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. It is made applicable to the States through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; *Benton v. Maryland*, 395 U.S. 784, 787 (1969). Texas law provides a similar protection, although it is identical to that under federal law. Tex.

Const. art. I, § 14; Tex. Code Crim. Proc. art. 1.10; *Hiatt v. State*, 319 S.W.3d 115, 125 (Tex. App.—San Antonio 2010, pet. ref'd) (citing *Stephens v. State*, 806 S.W.2d 812, 815 (Tex. Crim. App. 1990)).

The doctrine of collateral estoppel is embodied within the constitutional bar against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *Ex parte Watkins*, 73 S.W.3d 264, 267 (Tex. Crim. App. 2002). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. In a criminal case, this means that once a jury determines a discrete fact in favor of the defendant, the State cannot contest the jury's finding in a subsequent proceeding. *Watkins*, 73 S.W.3d at 268.

Although collateral estoppel is embodied within the bar against double jeopardy, the two concepts are not identical. *Id.* at 267. When it comes to their scope, double jeopardy is broader. *Id.* If double jeopardy applies, it bars any retrial of a criminal offense entirely; collateral estoppel, on the other hand, bars retrial only of specific and discrete facts that have been fully and fairly adjudicated. *Id.*

In *Ex parte Watkins*, the court of criminal appeals succinctly explained how to perform a collateral-estoppel analysis:

> In applying the doctrine of collateral estoppel, courts must first determine whether the jury determined a specific fact, and if so, how broad—in terms of time, space and content—was the scope of its finding. Before collateral estoppel will apply to bar relitigation of a

> discrete fact, that fact must *necessarily* have been decided in favor of the defendant in the first trial. The mere possibility that a fact *may* have been determined in a former trial is insufficient to bar relitigation of that same fact in a second trial.

Id. at 268. The scope of facts that were actually litigated determines the scope of the factual finding covered by collateral estoppel. *Murphy v. State*, 239 S.W.3d 791, 795 (Tex. Crim. App. 2007).

The court of criminal appeals has held that collateral estoppel must be considered using a two-prong test. *Id.* First, the court must determine exactly what facts were necessarily decided in the first proceeding. *Id.* "The first prong is fairly simple; the particular fact litigated in the first prosecution, in which a final judgment was entered, must be the exact fact at issue in the second prosecution." *Id.* The issue must be "precisely" the same in both cases, which limits the doctrine to "cases where the legal and factual situations are identical." *Ex parte Taylor*, 101 S.W.3d 434, 441 (Tex. Crim. App. 2002) (internal quotations and citations omitted). In this prong, a defendant making a collateral-estoppel claim bears the burden to demonstrate that "the ultimate issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *State v. Sauceda*, 980 S.W.2d 642, 650 (Tex. Crim. App. 1998) (citing *Schiro v. Farley*, 510 U.S. 222, 233 (1994); *Dowling v. United States*, 493 U.S. 342, 347 (1990)) (internal quotations and brackets omitted). A fact is the ultimate issue if it was "the only rationally conceivable issue in dispute in the first prosecution . . . ." *See York v. State*, 342 S.W.3d 528, 545–46 (Tex. Crim. App.

2011). The test for collateral estoppel is "whether the verdict was *necessarily* grounded upon an issue which the defendant seeks to foreclose from litigation, not whether there is a *possibility* that some ultimate fact has been determined adversely to the State." *Guajardo v. State*, 109 S.W.3d 456, 462 n.16 (Tex. Crim. App. 2003) (quoting *State v. Nash*, 817 S.W.2d 837, 840 (Tex. App.—Amarillo 1991, pet. ref'd)). When a fact is not necessarily determined in the former trial, the possibility that it may have been does not prevent re-examination of that issue. *Id.*

Second, the court must determine whether any necessarily decided facts constitute essential elements of the offense in the second trial. *Murphy*, 239 S.W.3d at 795. The second prong highlights a limitation to the doctrine of collateral estoppel. *See id.* Although collateral estoppel requires that the precise fact litigated in the first prosecution have arisen in the same transaction, occurrence, situation, or criminal episode that gave rise to the second prosecution, that alone is not enough—the fact litigated must also be an essential element of the subsequent offense. *Id.* Specifically, if the necessarily decided fact litigated in the first prosecution constitutes an essential element framed within the second prosecution's offense, then the second prong is satisfied. *Id.*

General verdicts can pose complications in a collateral-estoppel analysis because they "frequently make[] it difficult to determine precisely which historical facts a jury found to support an acquittal." *Watkins*, 73 S.W.3d at 269. Therefore, a

collateral-estoppel claim following a general verdict must meet a demanding standard:

> In each case, courts must review the entire trial record, as well as the pleadings, the charge, and the arguments of the attorneys, to determine with realism and rationality precisely which facts the jury necessarily decided and whether the scope of its findings regarding specific historical facts bars relitigation of those same facts in a second criminal trial.

Clewis v. State, 222 S.W.3d 460, 465 (Tex. App.—Tyler 2007, pet. ref'd) (citing *Watkins*, 73 S.W.3d at 268) (internal quotation omitted). To meet his burden, then, "the defendant must 'prove both that the issues are identical and that in reaching their verdict of not guilty in the first trial[,] the jury had to resolve the contested fact in favor of the defendant.'" *Ex parte McNeil*, 223 S.W.3d 26, 30 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (quoting *Ladner v. State*, 780 S.W.2d 247, 258 (Tex. Crim. App. 1989)).

Manslaughter, Criminally Negligent Homicide, and Aggravated Assault: A person commits manslaughter if he recklessly causes the death of an individual, and he commits criminally negligent homicide if he causes the death of an individual by criminal negligence. Tex. Penal Code §§ 19.04, 19.05.

A person acts recklessly with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. *Id.* § 6.03(c). A person acts with criminal negligence with respect to the

result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the result will occur. *Id.* § 6.03(d).

Criminally negligent homicide is a lesser-included offense of manslaughter because the two offenses differ only in that criminally negligent homicide requires a less-culpable mental state. *Stadt v. State*, 182 S.W.3d 360, 364 (Tex. Crim. App. 2005).

There are three so-called "conduct elements" that may be involved in an offense: (1) the nature of the conduct (2) the result of the conduct, and (3) the circumstances surrounding the conduct. *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). In a jury charge, the language in regard to the culpable mental state must be tailored to the conduct elements of the offense. *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015).

For nature-of-the-conduct offenses, specific acts are criminalized because of their very nature, so the culpable mental state must apply to committing the act itself. *McQueen*, 781 S.W.2d at 603. In result-of-the-conduct offenses, unspecified conduct is criminalized because of its result, so the culpable mental state must apply to that result. *Id.* And in circumstances-surrounding-the-conduct offenses, otherwise innocent behavior is criminalized because of the circumstances under which it is done, so the culpable mental state must apply to those surrounding circumstances. *Id.*

Manslaughter and criminally negligent homicide are result-oriented offenses, meaning that a jury charge must apply the respective mental states to the results of the defendant's actions—namely, the death of an individual. *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013) (explaining that manslaughter is result-oriented); *Stinecipher v. State*, 438 S.W.3d 155, 161–62 (Tex. App.—Tyler 2014, no pet.) (explaining the same regarding criminally negligent homicide). Aggravated assault causing bodily injury is also a result-oriented offense, the result being bodily injury to an individual, so the mental state must apply to that result. *Garfias v. State*, 424 S.W.3d 54, 60–61 (Tex. Crim. App. 2014).

Argument

Appellant failed to carry his burden to prove that doctrine of collateral estoppel bars the State from litigating any issues in the aggravated-assault case.

1. With respect to Part 5 of the Application, appellant failed to prove either prong of the collateral-estoppel analysis.

The first prong of a collateral-estoppel analysis requires the defendant to prove what facts were necessarily decided in the homicide trial. *Murphy*, 239 S.W.3d at 795. The Application failed to carry this burden.

A. The facts listed in paragraph 36 of the Application were neither contested nor decided in appellant's favor.

The part of the Application most relevant to the first prong was Part 5—and paragraph 36 in particular. There, appellant took the "relevant facts that were

necessarily decided" in the homicide case and "enumerated" them in a bulleted list. 1 C.R. at 110–11, ¶ 36 (internal quotation omitted). Appellant's list included the following:

- Appellant was speeding 31 miles-per-hour over the speed limit at the time of the collision;
- he failed to drive in a single lane of traffic;
- he drove over the median;
- he collided with Loehr and Parnell's vehicle;
- both vehicles were severely damaged;
- Loehr suffered injuries from the collision; and
- Parnell suffered severe injuries that proved fatal.

1 C.R. at 110–11, ¶ 36. The Application then argued that each of these facts "form an essential element" of the aggravated-assault case and claimed that "[u]nder collateral estoppel, these elements cannot again be litigated between the State and Defendant." 1 C.R. at 111–12, ¶¶ 37, 41.

But none of the facts in that list gives rise to a collateral-estoppel bar. Collateral estoppel only applies to the ultimate issue in the first trial, which is "the only rationally conceivable issue in dispute" in that trial. *See York*, 342 S.W.3d at 545–46. And as the words *ultimate* and *only* would suggest, there can only be one such issue. *See id.*

The facts listed in paragraph 36 were not in dispute in the homicide trial—to the contrary, the State and appellant agreed to them. A review of the closing arguments from both sides shows that appellant's identity, his conduct, and the cause

of Parnell's death were not in dispute. 1 C.R. at 494–533. In contrast, appellant and the State spent plenty of time arguing about appellant's mental state, but none about these other issues. 1 C.R. at 494–533. Because the facts discussed in paragraph 36 were not "in dispute[,]" they could not have been the ultimate issue in the homicide trial. *See York*, 342 S.W.3d at 545–46.

Along similar lines, appellant did not carry his burden to show that these facts were decided in his favor. *See Watkins*, 73 S.W.3d at 268. Because the facts in paragraph 36 were uncontested, they were not decided in either party's favor, and collateral estoppel will not bar future litigation concerning those facts. *See id.*

The Application failed to carry appellant's burden of proof under the first prong of the collateral-estoppel analysis with respect to any facts listed in paragraph 36.

B. The Application failed to prove that the State is barred from litigating his mental state in the aggravated-assault trial.

Also in Part 5 of the Application, appellant argued that collateral estoppel bars the State from litigating the mental-state issue in the aggravated assault trial. But this claim failed to meet either prong of the collateral-estoppel test.

i. Appellant failed to prove that the first verdict necessarily rested on the mental-state element, so he failed to meet the first prong of the collateral-estoppel analysis.

Appellant concluded in paragraph 42 of the Application that "the jury [in the homicide trial] already found that [he] did not act recklessly." 1 C.R. at 112, ¶ 42.

The Application failed to satisfy the first prong because it did not prove that the jury's verdict necessarily rested on the mental-state issue. *See Murphy*, 239 S.W.3d at 795.

On the one hand, the defense attacked the State's evidence that appellant had been driving irresponsibly. The State offered testimony about crash data showing that, just one tenth of a second prior to the crash, appellant was driving 71 miles per hour, with 100% accelerator pedal application, and without any braking. 1 C.R. at 289. Testimony showed that the speed limit was 40 miles per hour at that location. 1 C.R. at 262. The State also offered testimony from eyewitnesses to establish that appellant was speeding and driving unsafely. 1 C.R. at 218, 253. The defense contested this point and offered evidence that appellant was a safe driver who never had so much as a parking ticket. 1 C.R. at 373, 440. If appellant were indeed a safe driver, this theory might have led the jury to conclude that he was not aware of any risk.

But appellant's reputation for safe driving was not the only argument the defense submitted: It also submitted a blackout theory. During his case-in-chief, appellant testified that he did not remember anything about what happened during the traffic accident. 1 C.R. at 359–61. The defense implied that his memory loss could have happened because he was experiencing a panic attack. 1 C.R. at 49, 373. The defense even called a psychiatrist to testify, who diagnosed appellant as

suffering from panic attacks and further opined that panic attacks could result in memory loss. 1 C.R. at 417, 421. The defense summarized this testimony during closing arguments: The psychiatrist "said that there's typically a loss of memory with a panic attack[,]" and she diagnosed appellant with a "panic disorder . . . ." 1 C.R. at 512.

Any one of these arguments might have prevailed on the jury, but the Application does not establish which one. For one, defense counsel during closing arguments asked, "Was [appellant] actually aware of the risk? What evidence did you hear, any of you all, that he's ever had a break before; that he's aware of it; that he's had 20, 30 speeding tickets, red light tickets, he's not actually aware of anything and consciously disregards?" 1 C.R. at 504. Defense counsel continued: "You have to be aware of it. There has to be some type of forewarning. There has to be some type of element beforehand, and that didn't happen." 1 C.R. at 504. If the jury accepted that argument, then it may have concluded that appellant was not aware of any risk.

But defense counsel did not stop there. The defense also argued that appellant did not consciously disregard any risk:

> What evidence do you have of [appellant's] bad driving? What evidence do you have of drag racing? What evidence do you have of malice in his heart? What evidence do you have that there was no medical condition? What evidence do you have that this is somebody that didn't care about human life?

1 C.R. at 516. To these questions, the State offers a few more. Did the jury decide that the State failed to prove a substantial and unjustifiable risk even existed? The jury might have done just that, if it accepted appellant's evidence that he was a safe driver. Or if the jury instead believed that appellant blacked out while driving, then it might have reached a different conclusion. Was it that a substantial and unjustifiable risk existed, but that appellant's blackout made him unaware of it—or perhaps that appellant was aware of the risk, but that the blackout made him incapable of consciously disregarding it?

So, under appellant's argument, which fact is the ultimate fact that the State is collaterally estopped from relitigating? Is it (1) that there was no substantial and unjustifiable risk, (2) that appellant was not aware of any such risk, (3) that he did not consciously disregard any such risk, or even (4) something else entirely? The Application cited nowhere in the record to establish that any of these issues was the ultimate issue in the homicide trial; at best, the Application and the record leave open these several possibilities. That being so, the mere possibility that one of these issues was determined adversely to the State is not enough to trigger a collateral-estoppel bar. *See Guajardo*, 109 S.W.3d at 462 n.16; *Ex parte Minifee*, 842 S.W.2d 354, 356 (Tex. App.—Tyler 1992, no writ).

In support of his argument, appellant directs this Court to *Acuña v. State*, 13-13-00633-CR, 2016 WL 744712 (Tex. App.—Corpus Christi Feb. 25, 2016, no pet.)

(mem. op., not designated for publication). There, however, it was easy to identify the facts that the jury necessarily found. A jury found Acuña not guilty of murder; she was later convicted of conspiring to commit the same murder; and she raised collateral estoppel as a defense to the conspiracy conviction on direct appeal. *Id.* at *1. In the murder trial, it was clear that the case turned on the law of parties: No party disputed that a murder took place or who the principals to that murder were. *Id.* at *6, *9. The only issue was whether Acuña herself was guilty as a party. *Id.* To allege Acuña's guilt as a party, the indictment claimed that she committed five specific acts to aid, abet, or encourage the principals to the murder—five acts that were then mirrored in the jury charge. *Id.* at *9–10. The charge permitted the jury to find Acuña guilty if it found that the State had met its burden of proof regarding any one of those five acts. *Id.* at *10. Yet the jury found her not guilty. *Id.*

Then Acuña was indicted for conspiracy to commit the same murder, and the conspiracy indictment relied on the same five acts of encouragement. *Id.* On appeal, regarding the first prong of the collateral-estoppel analysis, the court noted that the earlier murder trial only turned on whether Acuña committed any one of the five specific alleged acts—so in reaching its verdict of not guilty, the jury necessarily decided that she had not. *Id.* at *9–11. And regarding the second prong, the court observed that those same five alleged acts had resurfaced in the conspiracy indictment: "Crucially, each of the overt acts alleged in the [conspiracy] indictment

is identical to one of the five specific acts of encouragement alleged" in the murder charge. *Id.* at *10. Based on the record, the jury in the murder case had necessarily decided that Acuña had not committed any of the five alleged acts, so the State was collaterally estopped from litigating those facts in the conspiracy case. *Id.* at *11.

Unlike *Acuña*, the facts litigated in the homicide case were not neatly enumerated in an indictment and in a jury charge. In *Acuña*, there were five ways for the State to win. The only facts litigated were whether Acuña committed any one of the five alleged acts, and the jury was permitted to return a guilty verdict if it found that the State met its burden with respect to any one of them. *Id.* at *9–10. So when the jury returned a verdict of not guilty, it could have done so only if it found against the State on each one of the five alleged acts. *Id.* at *9–11.

Here, however, there were at least three ways for the State to lose. As described above, the jury could have found that that there was no substantial and unjustifiable risk, that appellant was not aware of any such risk, or that he did not consciously disregard any such risk. If the jury believed any one of those facts, it would be sufficient to return a verdict of not guilty. And appellant challenged the State's evidence on all three points, so it is impossible to know which one was the ultimate fact.

Because the homicide case featured several ways for the factfinder to find against the State, this case is more akin to *Ex parte Tarlton*, 105 S.W.3d 295 (Tex.

App.—Houston [14th Dist.] 2003, no pet.). There, Tarlton was charged with the felony offenses of disposal of used oil and disposal of hazardous waste, and the cases proceeded to a bench trial. *Id.* at 297. At the close of the State's case, Tarlton requested a directed verdict, arguing that the State did not connect him with the property where the oil was dumped and that there was no evidence that he intentionally and knowingly deposited the oil. *Id.* at 297, 301. The trial court granted Tarlton's request for a directed verdict, but did not specify its reasons. *Id.* at 301.

The State later charged Tarlton by information with the misdemeanor offense of water pollution. *Id.* at 297. In response, Tarlton filed a pretrial application for writ of habeas corpus based on the doctrine of collateral estoppel (as appellant did), and the trial court denied relief. *Id.* Tarlton claimed in his application that the State was barred from relitigating a laundry list of facts. *Id.* at 301. But the Court of Appeals found that the record was not so clear cut. *See id.* In requesting his directed verdict, Tarlton challenged two facts: (1) that the State did not connect him to the property where the oil was dumped and (2) his mental state. *Id.* at 297, 301. Tarlton had prevailed, but because the grounds for his victory were unclear, collateral estoppel did not apply:

> If the trial court had specifically found that appellant was not sufficiently connected to the dumped oil, collateral estoppel would bar a subsequent prosecution. The trial court, however, could have based its decision on the lack of intent or any other basis. . . . Because the trial court could rationally have based its verdict on issues other than those

> appellant now seeks to foreclose, we cannot find that the instant prosecutions violated the collateral estoppel rule.

Id. at 301–02.

As in *Tarlton*, the Application failed to establish what issue was the ultimate issue in the first trial. Appellant challenged several parts of the State's case and therefore gave the jury several reasons to find him not guilty—and even one of those would have been sufficient for the jury to acquit him. Some part of his trial strategy was likely persuasive, but the Application and the record do not establish which part. The Application claimed that the State was barred from relitigating a laundry list of facts (including his mental state), but it failed to prove which of those facts (if any) was the ultimate issue in his trial.

Appellant has failed to satisfy the first prong of the collateral-estoppel analysis with respect to the mental-state issue.

ii. Even assuming the first verdict turned on appellant's mental state, he has failed to prove that the issue will be the same in the aggravated-assault trial, so he failed to meet the second prong of the collateral-estoppel analysis.

And appellant does no better with the second prong. *See Murphy*, 239 S.W.3d at 795. Even assuming *arguendo* that the jury necessarily decided against the State on the mental-state issue in the homicide trial, that would not bar the State from litigating appellant's mental state in the aggravated-assault trial. Those two mental states are not the same: The issue of whether appellant disregarded a substantial and

unjustifiable risk that Parnell would die as a result of his conduct is different from whether he disregarded a substantial and unjustifiable risk that Loehr would suffer bodily injury as a result of his conduct. For collateral estoppel to apply to an issue, that issue must be "precisely" the same in the first and second trials—meaning that the doctrine is limited to "cases where the legal and factual situations are identical." *Taylor*, 101 S.W.3d at 441 (internal quotations and citations omitted). To carry his burden, the defendant must prove that the issues are identical. *McNeil*, 223 S.W.3d at 30. Appellant has not.

Because the two offenses have different prohibited results, they also present different mental-state issues. Appellant's claim relies on three result-oriented offenses: manslaughter, criminally negligent homicide, and aggravated assault causing bodily injury. *Garfias*, 424 S.W.3d at 60–61; *Britain*, 412 S.W.3d at 520; *Stinecipher*, 438 S.W.3d at 161–62. In result-oriented offenses, the mental states *recklessness* and *criminal negligence* both require the existence of a "substantial and unjustifiable risk"—which refers to the "risk that . . . the result will occur." Tex. Penal Code § 6.03(c)–(d). In result-oriented offenses, the mental state never exists alone: It applies to the prohibited result and must be considered alongside that result. *See id.* Put another way, the jury does not consider the mental-state issue in the abstract—it rather considers whether the mental state applies to the prohibited result specifically. *McQueen*, 781 S.W.2d at 603.

Reviewing a collateral-estoppel claim requires the court to examine the earlier proceedings to determine what issues were necessarily decided by the factfinder. *Ashe*, 397 U.S. at 444. In the homicide trial, the jury considered manslaughter and criminally negligent homicide. Manslaughter and criminally negligent homicide are, naturally, forms of criminal homicide. Tex. Penal Code § 19.01(b). The prohibited result in both offenses is causing the death of an individual, and the only difference between the two is the mental state. *Id.* §§ 19.04(a), 19.05(a). For manslaughter, therefore, the court's charge must instruct the jury to consider whether the defendant caused the death of an individual recklessly; and for criminally negligent homicide, the court's charge should instruct the jury to consider whether the defendant caused the death of an individual by criminal negligence. For these result-oriented offenses, the court's charge should instruct the jury to apply the mental state to the prohibited result: causing the death of an individual.

And in the homicide trial, this Court's charge included those necessary instructions. The application paragraph regarding manslaughter instructed the jury to consider whether appellant did "recklessly cause the death" of Parnell, and the application paragraph on criminally negligent homicide instructed the jury to consider whether Appellant did "with criminal negligence cause the death" of Parnell. 2 Suppl. at 5, 7. The jury answered both questions in the negative: Through its verdict, it indicated that it did not find beyond a reasonable doubt that appellant

caused the death of Parnell by recklessness or criminal negligence. Even assuming that the verdict turned on appellant's mental state, it reflects conclusions about the mental state applied to the one prohibited result—causing Parnell's death—and no other result.

Appellant's argument extrapolated too much from the jury's verdict. The Application claimed that "the jury already found that [appellant] did not act recklessly. So even if a future jury were to find that [appellant] acted recklessly or with criminal negligence, facts that support such a finding were already found in the negative by the prior jury." 1 C.R. at 112, ¶ 42 (emphasis omitted). But contrary to Appellant's claim, the jury did not deliberate on whether he "*acted* recklessly or with criminal negligence"—it rather considered whether he recklessly or with criminal negligence *caused the death of an individual*. That question is narrower, so the scope of issues subject to collateral estoppel is narrower too.

Appellant's argument seems to assume that manslaughter and criminally negligent homicide are nature-of-the-conduct offenses, as if the jury had been asked whether the very nature of appellant's conduct was reckless or criminally negligent. If that were true, then perhaps the State would be barred from relitigating appellant's mental state as applied more generally to the nature of his conduct. But as mentioned above, the jury charge in the homicide case correctly instructed the jury to apply the mental state to the prohibited result: namely, the death of Parnell. 2 Suppl. at 5, 7.

Like manslaughter and criminally negligent homicide, aggravated assault is a result-oriented offense. *Garfias*, 424 S.W.3d at 60–61. But with aggravated assault, unlike those other offenses, the prohibited result is merely causing bodily injury to another rather than death. Tex. Penal Code § 22.02(a)(1). The court's charge will therefore instruct the jury to consider whether appellant intentionally, knowingly, or recklessly caused bodily injury to Loehr. Because the mental-state issue in the homicide trial was applied to the risk of death to an individual, the jury's verdict will have no bearing on the aggravated-assault case.

Mental states, when applied to different results, mean different things. Recklessness and criminal negligence come down to whatever the "substantial and unjustified risk" is. *See id.* § 6.03(c)–(d). In the homicide trial, that risk was Parnell's death; in the aggravated-assault trial, that risk will be bodily injury to Loehr. *Bodily injury* means physical pain, illness, or any impairment of physical condition. *Id.* § 1.07(a)(8). But that term played no part in the homicide trial—it was not even defined in the jury charge. 2 Suppl. at 3–9. Because the term was not introduced in the homicide trial, the verdict could not have included any finding regarding bodily injury.

In addition, the definition of *bodily injury* is "purposefully broad and seems to encompass even relatively minor physical contacts . . . . In fact, the degree of injury sustained by a victim and the type of violence utilized by an accused appear

to be of no moment." *Reyes v. State*, 83 S.W.3d 237, 239 (Tex. App.—Corpus Christi 2002, no pet.) (quoting *Lewis v. State*, 530 S.W.2d 117, 118 (Tex. Crim. App. 1975)) (internal quotation omitted). *Bodily injury* includes a nearly infinite variety of outcomes that are harmful, even if they stop short of causing death. Even if the first jury found that appellant's conduct did not carry a substantial and unjustifiable risk of death, it would not be inconsistent for a second jury to conclude that his conduct nevertheless carried a substantial and unjustifiable risk of bodily injury. Collateral estoppel, then, does not bar the State from litigating appellant's mental state in the aggravated-assault trial.

Appellant did not carry his burden to demonstrate that any of the facts discussed in Part 5 of the Application are subject to collateral estoppel, so the trial court did not abuse its discretion in denying habeas relief on those grounds.

2. Appellant has abandoned the claims in Part 6 of his Application because he has made no argument concerning those claims on appeal.

In Part 6 of the Application, appellant claimed that he could not have committed aggravated assault with a deadly weapon because the manner and means of his use could not have facilitated any felony. 1 C.R. at 112. Because appellant has not made the same claim before this Court, he has abandoned it.

3. Appellant's motion for joinder, which the trial court denied, has no bearing on the collateral-estoppel analysis.

In Part 7, the Application further argued that appellant requested for both cases to be tried in one proceeding but that his request was denied. Yet appellant's request for one trial has no bearing the collateral-estoppel analysis and does not otherwise bar the State from prosecuting the aggravated-assault case.

Citing *Currier v. Virginia*, 138 S. Ct. 2144 (2018), appellant claimed that "a defendant who moves for or agrees to a severance of charges may not successfully argue that a second trial violates the Double Jeopardy Clause." 1 C.R. at 122, ¶ 66 (emphasis omitted). That statement is correct, but it does not apply here. In *Currier*, the defendant himself requested that two cases be tried separately, and the trial court granted his request, meaning that the defendant was barred from claiming that the second trial violated the Double Jeopardy Clause. *Currier*, 138 S. Ct. at 2151. *Currier*, in other words, applied estoppel against the defendant rather against than the State: After requesting and receiving two trials, the defendant could not later raise a double-jeopardy complaint via *Ashe* when it came time for the second case to go to trial. *Id.* Appellant, however, did not successfully request two trials—he unsuccessfully requested one trial—so *Currier* does not apply here.

Appellant nevertheless argued below (as he argues before this Court) that *Currier* does apply to him. He seemed to argue that, merely by requesting one joint trial rather than two separate ones, he can place the State in a vice: Either the State

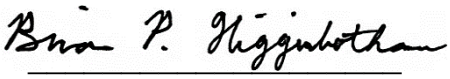
acquiesces to a joint trial (even if the trial court does not grant his request), or the State will be forever barred from bringing the second case to trial. *Currier*, however, does not support that novel theory, and appellant does not cite any authority that does. *Currier* does not apply here, either as a freestanding ground for relief or as support for appellant's collateral-estoppel claim.

The Application failed to carry appellant's burden of proof with respect to all of his claims, so the trial court did not abuse its discretion in denying habeas relief. Issue 1 should be overruled.

PRAYER

The trial court did not abuse its discretion in denying habeas relief. This Court should overrule appellant's sole issue and affirm the trial court's judgment.

Respectfully submitted,



JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

BRIAN P. HIGGINBOTHAM
Assistant Criminal District Attorney
State Bar No. 24078665
Frank Crowley Courts Building
133 N. Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399
(214) 653-3625 | (214) 653-3643 fax
brian.higginbotham@dallascounty.org

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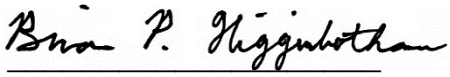

Brian P. Higginbotham

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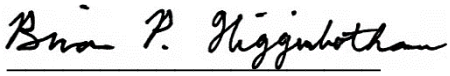

Brian P. Higginbotham